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No. 99-1045

In the Supreme Court of the United States

BEAR LODGE MULTIPLE USE ASSOCIATION, ET AL.,
PETITIONERS

v.

BRUCE BABBITT,
SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

In February 1995, the National Park Service issued the Final Climbing Management Plan (FCMP) for Devils Tower National Monument. The FCMP establishes a public educational program concerning the ceremonial uses of the monument by American Indians, who consider the Tower sacred and who hold annual ceremonies at the Tower. One of the purposes of the educational program is to persuade recreational rock climbers voluntarily to choose not to climb Devils Tower in the month of June, when Indian ceremonies occur at the monument. The question presented is:

Whether petitioners, recreational rock climbers who continue to be allowed to climb Devils Tower during June and who in fact have continued to climb the Tower during June, have established any injury to support their standing to challenge the FCMP.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	14

TABLE OF AUTHORITIES

Cases:

ACLU v. *City of St. Charles*, 794 F.2d 265 (7th Cir.), cert. denied, 479 U.S. 961 (1986)	10
ACLU v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983)	10
Allen v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970)	10
Anderson v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), cert. denied, 414 U.S. 879 (1973)	10
Bell v. *Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985)	10
Bennett v. *Spear*, 520 U.S. 154 (1997)	5
Committee for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756 (1973)	12
County of Allegheny v. *ACLU*, 492 U.S. 573 (1989)	9, 10, 12
Foremaster v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989), cert. denied, 495 U.S. 910 (1990)	10
Hawley v. *City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), cert. denied, 475 U.S. 1047 (1986)	10
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	6, 8
Lyng v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)	13, 14
Saladin v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987)	10
School Dist. of Abington Township v. *Schempp*, 374 U.S. 203 (1963)	9
Suhre v. *Haywood County*, 131 F.3d 1083 (4th Cir. 1997)	10

Cases—Continued: Page

United States v. *SCRAP*, 412 U.S. 669 (1973) 6
Valley Forge Christian College v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) 6, 8, 9, 11, 12
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 8

Constitution and statutes:

U.S. Const.:
Art. III 6, 8
Amend. I:
Establishment Clause 4, 5, 8, 9, 12, 13, 14
Free Exercise Clause 13, 14
American Indian Religious Freedom Act, 42 U.S.C. 1996 14
34 Stat. 3236 2
16 U.S.C. 1a-1 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 175 F.3d 814. The opinion of the district court (Pet. App. 42-63) is reported at 2 F. Supp. 2d 1448.

JURISDICTION

The court of appeals entered its judgment on April 26, 1999. A petition for rehearing was denied on August 18, 1999 (Pet. App. 66-67). On November 9, 1999, Justice Breyer granted petitioners' request for an extension of time within which to file a petition for a writ of certiorari until December 16, 1999, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1906, President Theodore Roosevelt issued a proclamation establishing Devils Tower as the first National Monument. 34 Stat. 3236. Since 1916, the Monument, a 600-foot butte in northeastern Wyoming, has been under the management of the National Park Service (NPS), which is charged with protecting the natural, cultural, and historical values of the Monument. 16 U.S.C. 1a-1. Devils Tower National Monument attracts approximately half a million visitors each year. Pet. App. 12-13 n.8.

In recent years, recreational rock climbing at Devils Tower has grown dramatically. In 1973, just over 300 climbers reached the top of the butte. In 1994, more than 2000 climbers reached the summit and another 4000 climbed other parts of the Tower. The growth in recreational climbing has affected a variety of resources of the Monument, including soil conditions, vegetation, integrity of the rock, natural quiet of the area, physical appearance of the rock, and nesting sites of endangered raptors. Pet. App. 11. It has also led to conflicts with American Indians, who hold annual ceremonies at the monument.[1] With the increase in recreational climbing at the Tower, Indians complained that the noise and visual presence of climbers on the Tower prevented them from holding their ceremonies in peace. *Ibid.*

In February, 1995, following three years of study and public involvement, the NPS issued a Final Climbing Management Plan (FCMP) for Devils Tower. In addition to establishing measures to protect the physical

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[1] Six Northern Plains Tribes consider Devils Tower to be an area of great importance in tribal heritage, culture, and spirituality. Ceremonial use of the butte by American Indians dates back at least to the mid-nineteenth century. Pet. App. 6.

integrity of the butte, the FCMP accommodates the ceremonial use of Devils Tower by establishing an educational program concerning the traditional Indian uses of the Tower. The FCMP seeks to persuade climbers to refrain from climbing during June, the month when Indians traditionally hold a Sun Dance. Pet. App. 12-14. Originally, the FCMP provided that the NPS would not issue commercial use licenses for the month of June, but the NPS reconsidered and rescinded that provision. In its final form, the FCMP provides that the NPS will issue permits for both recreational and commercial climbers throughout the year. *Id.* at 15, 48-50. The preamble to the FCMP provides, in pertinent part: "In respect for the reverence many American Indians hold for Devils Tower as a sacred site, rock climbers will be asked to voluntarily refrain from climbing on Devils Tower during the culturally significant month of June." *Id.* at 14, 72; 1 C.A. App. 88. The final rule in the FCMP thus provides:

> A voluntary closure to climbing at Devils Tower for the entire month of June will be encouraged beginning in 1995. The NPS will not enforce the closure, but will rely on (a) climbers regulating themselves and (b) a new educational program to motivate climbers and other park visitors to comply. The closure zone will include all areas inside the loop of the Tower Trail. Efforts will be made to encourage climbers, hiker/climbers, and anyone else from approaching the tower or wandering off the Tower Trail each year from June 1 through June 30.
>
> The value of a voluntary closure is that individuals can make a personal choice about climbing. Climbers can regulate themselves by deciding if

> they want to refrain from June climbing out of respect for American Indian cultural values.

1 C.A. App. 121.

The FCMP further provides that, if this educational program is determined to be unsuccessful, the NPS will consider other alternatives, including, but not limited to, the institution of a prohibition on climbing in June. Pet. App. 77; 1 C.A. App. 122. To date, the educational program has been considered a great success, as rock climbing on Devils Tower has declined 85% in June since the adoption of the FCMP. See 2 C.A. App. 202.

2. In March 1996, petitioners challenged the FCMP in a suit against the NPS and federal officials. Petitioners are the Bear Lodge Multiple Use Association (BLMUA) (an association that includes Devils Tower climbers); Andy Petefish (the owner of a commercial climbing operation); and Gary Anderson, Kenneth Allen, Gregory Hauber, and Wes Bush (four recreational climbers). Petitioners allege that the FCMP violates the Establishment Clause of the First Amendment by coercing climbers to support American Indian religions and by conveying a governmental endorsement of those religions. Petitioners' second amended complaint alleged the following injuries: (1) that the FCMP denies members of petitioner BLMUA the opportunity to climb Devils Tower, 1 C.A. App. 22; (2) that the FCMP denies petitioners Petefish, Anderson, Allen, Hauber, and Bush the opportunity to climb Devils Tower without fear that the government may someday take away their climbing privileges, *id.* at 22-24; and (3) that the FCMP caused petitioner Petefish economic injury in his operation of a commercial climbing outfit, *id.* at 22-23.

On April 2, 1998, the district court rendered judgment in favor of the federal defendants on the merits of petitioners' claims. Pet. App. 42-63. The court found that the program of encouraging climbers not to climb during June represents an appropriate means of accommodating American Indian practices and does not violate the Establishment Clause. *Id.* at 54-61.

3. On April 26, 1999, the court of appeals affirmed the judgment in favor of the federal defendants on the ground that petitioners had not shown injury sufficient to establish standing to challenge the FCMP. Pet. App. 1-20. Addressing each of the three injuries asserted by petitioners in their complaint, the court first found that petitioners' opportunity to climb Devils Tower had not been constrained by the FCMP, since they remain free to climb Devils Tower throughout the year, including during the month of June. *Id.* at 16-17. Indeed, each of the individual petitioners has continued to climb the Tower in June. *Id.* at 18. Next, the court found that the "[c]limbers' fear of an outright climbing ban in June does not satisfy the constitutional requirement for an injury in fact, which must be 'actual or imminent not conjectural or hypothetical.'" *Id.* at 19 (quoting *Bennett* v. *Spear*, 520 U.S. 154, 167 (1997)). Third, the court found that petitioner Petefish had not substantiated his claim of economic injury. *Id.* at 18-19.

ARGUMENT

Petitioners contend that the court of appeals erred in finding that they lack standing to challenge the portion of the Final Climbing Management Plan for the Devils Tower National Monument that provides for voluntary refraining from climbing during the month of June. That fact-bound claim is not supported by this Court's precedents, and the court of appeals' decision does not

conflict with any decision of any other court. Further review, therefore, is unwarranted.

1. This Court articulated the "injury in fact" component of standing in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992): "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations, footnotes, and internal quotation marks omitted). Article III thus does not provide a judicial forum for cases that present "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687 (1973). See also *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982) ("[T]he psychological consequence presumably produced by observation of conduct with which one disagrees * * * is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms."). Instead, plaintiffs must make "a factual showing of perceptible harm." *Lujan*, 504 U.S. at 566.

The court of appeals' application of the injury-in-fact standard is fully consistent with this Court's decisions. As the court of appeals correctly determined, petitioners did not support the three allegations of injury in their complaint. First, notwithstanding petitioners' assertion that the FCMP injured them by restricting their opportunity to climb Devils Tower, 1 C.A. App. 22-24, the FCMP establishes a purely voluntary plan under which petitioners remain free to climb Devils Tower any time they choose. Indeed, all of the individual petitioners have continued to climb during

June. Pet. App. 18, 46 n.3. Second, although petitioners' complaint asserts that the FCMP caused them injury by creating the "fear that [their] climbing privileges on Devils Tower will be taken away permanently or will be constrained in any other manner," 1 C.A. App. 24, the court of appeals correctly found that prohibiting recreational climbing in June is just one of many possibilities that NPS may consider if the present plan proves unsuccessful and, as such, is too remote to support standing. Pet. App. 19. Third, although petitioners' complaint alleges that the FCMP caused economic injury to petitioner Petefish in his ownership of a commercial climbing operation, 1 C.A. App. 32, the court found that he failed to substantiate that claim. Pet. App. 18-19.[2] Accordingly, the court of appeals correctly found that petitioners had established no injury in fact resulting from the FCMP.

2. Petitioners nonetheless contend (Pet. 8-16) that the court of appeals' decision is inconsistent with decisions of this Court and other courts of appeals because, purportedly, petitioners should have been allowed to establish standing by showing that they were "directly affected" by the FCMP as a result of their opposition to the voluntary undertakings it contains to induce a measure of accommodation for Indian religious practices. That asserted basis for standing is not before this Court because it was neither asserted in petitioners' complaint nor raised before the court of

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[2] Without citation, petitioners assert (at 13 n.8) that they presented "uncontroverted evidence" of Mr. Petefish's economic injury. That fact-specific assertion is erroneous. As the district court found, Mr. Petefish presented no evidence in support of his claim of economic injury, Pet. App. 39 n.8, and the court of appeals found that he provided no additional documentation before the court of appeals, *id.* at 18-19.

appeals. See *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992) ("[T]he Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below."). In the proceedings before the district court and the court of appeals, petitioners asserted that they had standing because the FCMP allegedly injured them by (1) diminishing their opportunities to climb, (2) causing petitioner Petefish economic injury in his operation of a commercial climbing outfit, and (3) causing petitioners to fear that the government would prohibit climbing in the future. Petitioners did not assert that they could establish standing merely by showing that they were "directly affected" by the FCMP in the manner they now claim, without showing any other injury.

Even were petitioners' newfound theory of standing properly presented by the petition, it would not raise an issue warranting further review. Petitioners presented no evidence that they were "directly affected" by the FCMP itself, and the court of appeals' rejection of petitioners' assertion of standing does not conflict with the decisions of this Court or any other court. This Court has held that Article III standing requires a showing that the challenged government action *injured* the plaintiff in the sense that it caused "an invasion of a legally protected interest," *Lujan*, 504 U.S. at 560, not merely that the government action "directly affected" the plaintiff in the sense of causing offense or disagreement. The cases cited by petitioners from this Court and the courts of appeals (Pet. 8-13) are inapposite.

a. Contrary to petitioners' assertion (Pet. 8-9), this Court has consistently held that parties bringing Establishment Clause challenges must identify a discernible injury to establish standing. See, *e.g.*, *Valley Forge*, 454 U.S. at 487 n.22 (describing Establishment

Clause finding of standing when children "were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them") (citing *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203 (1963)). Petitioners here have made no similar allegation or showing of injury. The challenged FCMP contains only a request that petitioners not engage in recreational rock climbing during the month of June. Petitioners do not allege that they have been asked to observe or participate in any religious exercise, let alone that they have been "subjected to unwelcome religious exercises." *Ibid.* Nor do petitioners allege that they have been "forced to assume special burdens to avoid" (*ibid.*) the religious ceremonies, as they remain free to climb whenever they want, including during the month of June. See also *id.* at 485 ("Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error.").

County of Allegheny v. *ACLU*, 492 U.S. 573 (1989), also cited by petitioners (Pet. 9), does not support their contention. In that case, this Court held that the display of a Christmas creche on county property violated the Establishment Clause. While this Court's opinion did not address the plaintiffs' standing to challenge the religious display, it is plain that petitioners here allege a very different sort of injury than was at issue in *County of Allegheny*. Unlike the plaintiffs in *County of Allegheny*, who claimed that they were subjected to unwelcome religious displays on government property, petitioners here do not object to the use of government property for religious purposes—that is, petitioners have never challenged the government's authority to allow American Indians to hold their ceremonies at

Devils Tower. Instead, petitioners object to the government's policy of requesting that climbers allow the Indians to hold their ceremonies in peace. Rather than alleging that they were subjected to unwelcome religious displays, petitioners here allege that the government's effort to accommodate religious ceremonies interferes with their opportunity to engage in recreational rock climbing. Because their opportunity to engage in rock climbing has not been affected, they can show no such interference, and thus the court of appeals' conclusion that they lack standing does not conflict with *County of Allegheny*.

b. Petitioners erroneously argue (Pet. 9-11) that the court of appeals' decision conflicts with those of the other courts of appeals, which, in petitioners' view, hold that standing may be established when government conduct concerning religion "directly affects" a plaintiff, without showing any concrete injury. In support of that claim, petitioners mistakenly rely on cases in which plaintiffs objected to religious displays on government property. Pet. 9-13 (citing *Suhre* v. *Haywood County*, 131 F.3d 1083 (4th Cir. 1997); *Foremaster* v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989), cert. denied, 495 U.S. 910 (1990); *Saladin* v. *City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987); *ACLU* v. *City of St. Charles*, 794 F.2d 265 (7th Cir.), cert. denied, 479 U.S. 961 (1986); *Hawley* v. *City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), cert. denied, 475 U.S. 1047 (1986); *Bell* v. *Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391 (10th Cir. 1985); *ACLU* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983); *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), cert. denied, 414 U.S. 879 (1973); *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970)). Those decisions do not support petitioners' standing theory, because the plaintiffs in each case

asserted that they had been injured by coming into contact with allegedly offensive religious displays on government property. In contrast, petitioners do not claim to have been injured by coming into contact with the American Indian ceremonies at Devils Tower. Rather, petitioners allege that they have been injured by being asked not to engage in recreational rock climbing during the month of June. Because petitioners failed to show any injury resulting from that request, the court of appeals correctly found that they lacked standing. Thus, even if petitioners were correct in asserting (Pet. 12-13) that the courts of appeals are divided as to what injury is necessary to challenge a religious display on government property, this case does not present a vehicle for resolving that circuit conflict.

c. Petitioners further contend (Pet. 14-16) that the court of appeals' rejection of standing asserted by petitioner BLMUA conflicts with this Court's decisions regarding organizational standing. According to petitioners, BLMUA had standing to challenge the FCMP because BLMUA consistently opposed the FCMP. But while members of BLMUA "are clearly incensed by the NPS' request that they voluntarily limit their climbing," Pet. App. 19, their opposition to that request does not itself establish injury sufficient to support standing. As this Court held in rejecting the claim of organizational standing in *Valley Forge*, opposition to government action by itself is insufficient to establish standing:

> [S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy. [T]hat concrete adverseness which sharpens the presentation of issues * * * is the anticipated

> consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.

454 U.S. at 486 (internal quotation marks and citations omitted). Regardless of the vehemence of its opposition to the request that climbers refrain from climbing during June, BLMUA can show no injury to its members resulting from that request. Accordingly, there is no conflict between the court of appeals' decision and any decision of this Court regarding organizational standing.

3. There is no merit to petitioners' assertion (Pet. 17-26) that there is a conflict between the court of appeals' decision and decisions of this Court regarding what constitutes impermissible governmental coercion in an Establishment Clause challenge. Because the court of appeals found that petitioners lacked standing, it did not address the merits of their Establishment Clause claim, including any assertions of governmental coercion. In any event, this Court "repeatedly has stated that 'proof of coercion' is 'not a necessary element of any claim under the Establishment Clause.'" *County of Allegheny*, 492 U.S. at 597-598 n.47 (quoting *Committee for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 786 (1973)). Thus, even had the court of appeals addressed the merits of petitioners' Establishment Clause claim, it would not have been necessary for it to address the meaning of coercion.

Even were petitioners' claims of unlawful governmental coercion properly presented by the petition, they are without merit. The FCMP establishes a program to educate the public regarding the ceremonial uses of Devils Tower with the goal that, through education, climbers will voluntarily choose to refrain from

climbing out of respect for Indian ceremonies. Such a program to encourage respect for our Nation's religious diversity neither amounts to government establishment of a religion nor coerces non-adherents, because rock climbers remain free to climb Devils Tower throughout the year. Indeed, all of the individual petitioners have in fact continued to climb during June. Pet. App. 18-19, 46 n.3.[3]

4. Petitioners erroneously suggest (Pet. 26-30) that this petition presents the question whether federal land may be closed to the public because it is considered sacred. That question is not properly before this Court because the court of appeals did not address the merits of petitioners' Establishment Clause challenge and ruled only on petitioners' standing to sue. In any event, the FCMP does not close any land to any members of the public, who may visit and climb Devils Tower throughout the year.

Furthermore, while the merits of petitioners' Establishment Clause claim are not before this Court, petitioners are mistaken in arguing (Pet. 28-30) that adoption of the FCMP conflicts with this Court's decision in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). In *Lyng*, this Court held that the Free Exercise Clause does not prohibit the government from building a road through land held sacred by American Indians. Although such accommodation is

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[3] Petitioners are incorrect in arguing (Pet. 19-23) that the NPS has established a religion by threatening to close Devils Tower during June if the voluntary program is unsuccessful. The FCMP makes clear that prohibiting climbing during June is but one of many options that the NPS may consider if the FCMP is unsuccessful. As the court of appeals correctly found, the possibility of such a ban is too remote and speculative to support standing. Pet. App. 19.

not required by the Free Exercise Clause, this Court stated that the government could choose to accommodate religious use of federal land without violating the Establishment Clause: "[T]he Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents." *Id.* at 454. As the Court recognized, accommodating the religious interests of American Indians "accords with 'the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian[,] . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.'" *Id.* at 454-455 (quoting American Indian Religious Freedom Act, 42 U.S.C. 1996). There is thus no conflict between *Lyng* and the NPS's accommodation of Indian ceremonial use of the Devils Tower effectuated through the FCMP.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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